BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STANLEY D. CONVERSE	)	
Claimant	)	
VS.	)	
	)	Docket No. 184,630
ADIA PERSONNEL SERVICES	)	
Respondent	)	
AND	)	
	)	
PACIFIC EMPLOYERS INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Both claimant and respondent requested review of the Award entered by Special Administrative Law Judge William F. Morrissey dated July 10, 1995.

APPEARANCES

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Eric R. Yost of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Special Administrative Law Judge entered an award for permanent partial disability benefits based upon an 8 percent impairment of function. Claimant appealed the Award and seeks review of the Special Administrative Law Judge's findings and conclusions concerning the nature and extent of claimant's disability. The respondent also appealed the Award seeking Appeals Board review of the issue concerning the claimant's average weekly wage. Those are the two issues now before the Appeals Board on this review. The liability of the Kansas Workers Compensation Fund (Fund) was also an issue before the Special Administrative Law Judge. The Fund was found liable for 100 percent of the award. That issue was not raised in this appeal. Accordingly, the Appeals Board adopts the findings, conclusions and orders of the Special Administrative Law Judge as set forth in his Award concerning the issue of Fund liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire file and having considered the briefs and arguments of the parties, the Appeals Board finds that the Award of the Special Administrative Law Judge should be modified to find claimant entitled to an award of permanent partial disability benefits based upon a work disability of 43 percent.

The parties stipulated that claimant suffered personal injury by accident arising out of and in the course of his employment with respondent on August 14, 1993 through August 23, 1993. On August 14, 1993, claimant was working at a warehouse at ELF ATOCHEM through ADIA Temporary Services. ELF ATOCHEM handles refrigerants and claimant was hired as a temporary laborer through ADIA Temporary Services. His job included moving gas bottles. On claimant's first day on the job, he started having problems in his back and neck. However, he thought that perhaps he was just out of shape and not used to doing such heavy work. Therefore, he continued to work until August 23, 1993. During this time his condition worsened and he asked permission from his supervisor to see a doctor. He was first seen by Dr. Walter L. Reazin who prescribed medication and eventually referred claimant to an orthopedic surgeon, Eustaquio Abay, II, M.D., who performed a discectomy and cervical fusion. Following a period of post-surgical care, Dr. Abay referred claimant to Lawrence R. Blaty, M.D., a specialist in physiatric medicine, for physical therapy and a functional capacities evaluation. At the time of the regular hearing, claimant was not working and had not performed any work for wages since working for respondent. Claimant was pursuing a bachelor's degree in business administration at Wichita State University.

Claimant seeks a work disability in excess of his functional impairment rating. Because his is an "unscheduled" injury, claimant's right to permanent partial disability benefits is covered by K.S.A. 1993 Supp. 44-510e(a) which provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

At the request of his attorney, claimant was interviewed by a vocational counselor, Mr. Jerry Hardin. During that interview, Mr. Hardin ascertained from claimant the jobs and job duties claimant had performed in the previous 15 years. Based upon this information, Mr. Hardin developed a list of each job the claimant had performed for the 15-year period next preceding his accident and the essential job tasks for each of those jobs. Claimant was also interviewed, at the request of respondent, by Ms. Karen Crist Terrill, a vocational rehabilitation counselor. She likewise developed a list of claimant's jobs and job tasks. Ms. Terrill testified concerning her opinion as to claimant's loss of task performing ability using the restrictions imposed by Dr. Blaty and taking into consideration claimant's preexisting restrictions recommended by Dr. Abay. However, since K.S.A. 1993 Supp. 44-510e(a) requires the percentage loss of task-performing ability to be "in the opinion of the physician," this opinion testimony of Ms. Terrill cannot be used.

Dr. Blaty, a board-certified physiatrist, testified on behalf of claimant. He first saw claimant for this injury on December 1, 1993, at the request of Dr. Abay. Claimant was placed in an exercise program and given prescription anti-inflammatory medication. Dr. Blaty also ordered a functional capacities evaluation. That evaluation indicated that claimant was functioning at the light-medium physical demand category. Dr. Blaty ultimately rated and released claimant with certain permanent restrictions. His restrictions included functioning at or below the light-medium physical category and, specifically, included no level lifting of more than 30 pounds occasionally, 15 pounds frequently, or 6 pounds continuously. Claimant was also restricted to no overhead lifting greater than 25 pounds occasionally, 10 pounds frequently, or 5 pounds continuously. He was also instructed to perform only occasional bending, overhead reaching, or crawling activities. Dr. Blaty opined that claimant sustained a 19 percent permanent partial impairment of function as a result of his injury. Furthermore, Dr. Blaty testified that, in his opinion,

claimant had a 41 percent reduction in his ability to perform the tasks which he had performed over the past 15 years. He also testified that the job that claimant was performing at the time of his injury was in violation of the restrictions Dr. Blaty had placed on him previously.

Dr. Blaty had treated claimant previously in 1991 after a prior injury. That treatment was likewise from a referral by Dr. Abay. At that time, claimant was given an 11 percent functional impairment rating to the body as a whole. Dr. Blaty testified that, in his opinion, claimant sustained a permanent aggravation of his preexisting condition. The restrictions Dr. Blaty gave claimant in 1991 were also in the light to medium category and included exerting forces of up to 20 pounds occasionally, 10 pounds frequently, and negligible weights constantly. His maximum level lifting capacity was 28 pounds with a squat lift capacity of 23 pounds, overhead of 12 pounds. Claimant needed to restrict his bending and squatting to occasional, only infrequent kneeling, and occasional sitting and standing. Also, he would need to alternate the sitting and standing. Dr. Blaty admitted that the physical restrictions he imposed in 1991 were fairly comparable to the physical restrictions he imposed in 1994. With regards to his task-loss assessment, Dr. Blaty agreed with counsel for respondent that if he were to use and impose the 1991 restrictions, it would probably give a result comparable to the 1994 restrictions. Respondent argues, therefore, that since the restrictions placed upon claimant in 1994 were not any more restrictive than those given to him prior to the subject injury, that he has no loss of task-performing ability.

Respondent presented the testimony of board-certified physiatrist Philip Roderick Mills, M.D. Dr. Mills had seen claimant for back complaints on January 27, 1992, which was prior to the injury which is the subject of this case. Dr. Mills reviewed the medical records, including those of Dr. Blaty. Based upon his review of those records, Dr. Mills concluded that Dr. Blaty had imposed fewer restrictions on claimant after claimant's 1993 injury than he had after claimant's 1991 injury. Dr. Mills also reviewed the assessment of claimant's loss of task-performing ability produced by Ms. Terrill. Dr. Mills opined that claimant had suffered approximately a 7 or 8 percent loss of his ability to perform those job tasks.

Counsel for claimant argues for a permanent partial disability award based upon a 70.5 percent work disability, arrived at by utilizing the 41 percent loss of task-performing ability opinion given by Dr. Blaty and based upon the fact that claimant is unemployed, a 100 percent difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage claimant is now earning.

Regarding claimant's loss of wage, respondent argues that the Appeals Board should impute a wage based upon the public policy enunciated by the Kansas Court of Appeals in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied, 257 Kan. 1091 (1995) as follows:

> Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system." 20 Kan. App. 2d 277 at Syl. ¶ 4.

Although the Court of Appeals in Foulk applied an earlier version of the K.S.A. 44-510e, the Appeals Board has previously held that the public policy espoused in Foulk applies to accidents arising under the 1993 amendments to the Workers Compensation Act where a claimant "has refused employment which the claimant has the ability to perform or voluntarily removes himself from the labor market without good reason." Wollenberg v. Marley Cooling Tower Co., Docket No. 184,428 (September 26, 1995). However, the Appeals Board finds that Foulk does not apply to the facts and circumstances of this case. First, although claimant clearly could have better cooperated with respondent after his release, respondent, on the other hand, never offered claimant an accommodated job within his restrictions paying a wage comparable to that which he was earning at the time of his injury. Second, although it again presents a close question, it has not been established that claimant voluntarily removed himself from the labor market without good reason. Claimant looked for work other than with respondent after being released with permanent restrictions by Dr. Blaty but was unable to find work within his restrictions. Under these facts, the Appeals Board believes that claimant has reason to believe he could not find employment in the labor market that he could perform within his restrictions that would pay him a comparable wage. Instead, claimant chose to continue his education and obtain a degree which would then place him in a much better position to find full-time work paying a wage comparable to that which he was earning at the time of his injury. Prior to his injury claimant had attended college and was near completion of his bachelor's degree in business administration. At the time of the February 14, 1995 regular hearing, claimant testified he was then only 12 hours away from graduating. Therefore, his decision to complete his education rather than accept a temporary job with respondent or seek other employment does not, under the facts of this case, constitute a voluntary removal from the labor market so as to invoke the public policy considerations announced in Foulk. Respondent argues that it could have accommodated claimant in a full-time, comparable-wage paying job. However, it did not do so. Furthermore, respondent could have offered claimant vocational rehabilitation benefits but, again, chose not to do so. The Appeals Board finds that the public policy considerations in Foulk do not apply to this case and therefore a wage should not be imputed for purposes of determining claimant's eligibility for a work disability under K.S.A. 1993 Supp. 44-510e(a). Accordingly, the conclusive rule against work disability where a worker is engaging in work for wages equal to 90 percent or more of the average weekly wage does not apply.

The Appeals Board further finds the opinions of Dr. Mills as to claimant's tasks loss to be more credible and reliable in this instance than those given by Dr. Blaty. Although, unlike Dr. Blaty, Dr. Mills did not have the opportunity to treat and examine claimant both prior to and after the injury which is the subject of this case, Dr. Mills relied upon the restrictions given by Dr. Blaty in arriving at his task-loss opinions. K.S.A. 1993 Supp. 44-501(c) provides:

> "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

Dr. Blaty did not give an opinion of the percentage of tasks claimant lost the ability to perform as between the restrictions he gave in 1991 and the restrictions he gave in 1994. Dr. Blaty said they were fairly comparable but he did not do the analysis necessary to arrive at an actual percentage figure using the 1991 restrictions. Accordingly, the Appeals Board adopts the 8 percent tasks-loss opinion given by Dr. Mills. Averaging this task-loss percentage with the 100 percent wage loss results in a work disability of 54 percent.

K.S.A. 44-501(c) could be read to provide that the disability award should always be reduced by the amount of functional impairment which preexisted the subject injury. However, as this is a work disability award whereby claimant's 15-year tasks-loss percentage has already been reduced to account for the preexisting restrictions, it is unnecessary to also subtract the percentage of functional impairment determined to be preexisting. The two above-quoted sentences from K.S.A. 44-501(c) should be read together. We do not interpret this statute to require both that the work disability be reduced to eliminate those tasks claimant performed during the 15-year period which he can no longer perform due to a preexisting condition and to also subtract out the preexisting functional impairment in those cases where to do so would result in penalizing claimant by deducting twice for the same preexisting condition. The alternative to the approach we have taken herein would be to reduce the disability award by the preexisting functional impairment percentage but not adjust the work disability award by first eliminating the tasks claimant could no longer perform at the time of his subject injury due to his preexisting restrictions before determining the tasks claimant has lost the ability to perform from the subject injury. If we were to disregard the restrictions claimant was given in 1991, in this case the task loss would be 41 percent, rather than 8 percent. By enacting the 1993 amendments to K.S.A. 44-501(c) the legislature intended for workers with preexisting conditions to only be compensated for new injuries to the extent the new injury caused increased disability. The minimum compensation would be the amount of increase in functional impairment. This legislative intent is best achieved by taking into consideration any preexisting restrictions when determining tasks loss. However, to then also subtract the preexisting functional impairment would result in accounting for the same preexisting condition twice. Accordingly, the Appeals Board finds that claimant is entitled to permanent

partial disability benefits based upon a 54 percent work disability without reduction for the preexisting percentage of functional impairment.

The Appeals Board also modifies the finding by the Special Administrative Law Judge as to claimant's average weekly wage. At the time of the accident, claimant was a full-time hourly employee as defined by K.S.A. 44-511(b)(4). Claimant's average weekly wage should be based upon an hourly rate of $7 times 8 hours per day for 5 days per week, or 40 hours per week, plus 8 hours per week overtime at time-and-a-half. This results in a gross average weekly wage of $364 and a compensation rate of $242.68.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey dated July 10, 1995, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Stanley D. Converse, and against the respondent, ADIA Personnel Services, and its insurance carrier, CIGNA, and the Kansas Workers Compensation Fund for an accidental injury which occurred August 23, 1993, and based upon an average weekly wage of $364 for 46 weeks of temporary total disability compensation at the rate of $242.68 per week or $11,163.28, and 207.36 weeks of permanent partial disability compensation at the rate of $242.68 per week or $50,322.12, for a 54% permanent partial disability, making a total award of $61,485.40.

As of December 20, 1996 there is due and owing claimant 46 weeks of temporary total disability compensation at the rate of $242.68 per week or $11,163.28, followed by 173.57 weeks of permanent partial disability compensation at the rate of $242.68 per week in the sum of $42,121.97 for a total of $53,285.25, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $8,200.15 is to be paid for 33.79 weeks at the rate of $242.68 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The majority in the above opinion, when awarding claimant work disability, failed to reduce claimant's award of compensation by the amount of "functional impairment determined to be preexisting." K.S.A. 44-501(c) requires that an award not be provided to an employee for the aggravation of a preexisting condition "except to the extent that the work-related injury causes increased disability." This has been accomplished by the majority as the claimant's tasks loss took into consideration the preexisting restrictions which prohibited claimant from performing certain tasks. These earlier restrictions from a 1991 injury had to be taken into account in order to compute the extent that this work-related injury caused increased disability. The majority however then errs in not reducing the functional impairment determined to be preexisting. The logic of the majority contradicts the language of K.S.A. 44-501(c). The legislature has mandated that work disability awards must take into consideration how the particular injury increased the later disability. The legislature also mandated that the award of compensation "shall be reduced by the amount of functional impairment determined to be preexisting." The majority has elected to apply one facet of K.S.A. 44-501(c) while rejecting the other.

The language of K.S.A. 44-501(c) is clear in that both should be considered in computing an award. Claimant's preexisting conditions must be considered in order to determine what increased disability was created as a result of this work-related injury and claimant's preexisting functional impairment must also be considered and reduced from the award as mandated by the specific language of K.S.A. 44-501(c).

The majority rationalizes that to subtract both the preexisting functional impairment and to take into consideration the preexisting restrictions would result in a double deduction of claimant's preexisting conditions. I disagree. In order to understand the extent of disability suffered by this injury the prior restrictions must be taken into consideration. The statute then mandates the reduction of the preexisting functional impairment from the newly computed work disability suffered from this injury. As such, I would further reduce claimant's work disability award by the preexisting functional impairment suffered by claimant from the 1991 injury.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Kirby A. Vernon, Wichita, KS
Eric R. Yost, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director